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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1931
CERTIORARI GRANTED OCTOBER 19, 1931

SUPREME COURT OF THE UNITED STATES

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of stamp and special taxes upon the manufacture and sale of these so-called colored cooking compounds, and while the bureau is of the opinion that they are unquestionably made in imitation or semblance of butter and should be subject to the tax imposed under the oleomargarine law, the only satisfactory solution of the problem appears to be through legislation, such as the passage of H. R. 10958, Seventieth Congress, first session, which specifically brings such products within the classification of oleomargarine.

Very truly yours,

Robt. H. Lucas, Commissioner."

The report of the Senate Committee on Agriculture and Forestry, by Senator McNary, quotes a report of the Secretary of the Treasury, where it is said:

"The proposed legislation is designed to bring within the taxing and regulatory provisions of the act mentioned certain substances or mixtures which are now being manufactured and placed on the market as colored cooking compounds."

While the opinion of the Legislative body is not binding upon the courts it certainly is persuasive and entitled "to great weight in assisting a court when in doubt." (U. S. v. Stafoff, 260 U. S. 277, at 280).

This question was before the Court in U. S. v. Virginia-Carolina Chemical Co. 163 Fed. 66, at 74:

"It is to be regretted that this Court cannot follow the holdings in the Cobban and Twining Cases, but is constrained to hold that no authority existed at or before the finding of this indictment authorizing the Attorney General of the United States to issue a commission that would, with the sanction of law, authorize special assistants to the United States Attorney to appear before and participate in the proceedings of a grand jury, as was done in this case. The Congress of the United States so

understood the law to be at that time. On June 30, 1906 (more than a month after the indictment was found), it was enacted as follows:

> 'That the Attorney General or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.
>
> "Approved June 30, 1906."
> Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp, 1907, p. 44).

"Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this case; that is, appoint special assistants to the district attorneys to assist him in discharging their duties in grand jury proceedings. Mr. Gillet, of the House Judiciary Committee, reported the bill from that committee, and therein said:

> 'As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it.'

"He understood, and Congress understood, that at that time only the district attorneys had authority to appear before a grand jury, no matter how important the case may be.

and firms located outside of the State of Florida where the product is manufactured, and sells and ships said product to a great number of firms and persons (too numerous to be set forth herein), located in many States of the United States outside of the State of Florida.

6. Plaintiff further states that it has engaged in the manufacture of Southern Nut Product at the location heretofore mentioned for three years, and maintains and operates a plant and offices in the said city of Jacksonville for the conduct of said business; and that in carrying on said business it has built up a reputation and standing for fair and honest dealing with its customers and others with whom it has done business.

7. Plaintiff further states that prior to engaging in the manufacture and sale of said Southern Nut Product, an action at law had been brought against one Page, a collector of internal revenue of the United States for the district of Rhode Island, for the purpose of recovering from said collector taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company know as Nut-Z-All, which product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured by plaintiff herein, and that after hearing the evidence submitted on behalf of both plaintiff and defendant, it was held by the court that the said product Nut-Z-All was not made in imitation or semblance of butter, nor when so made calculated or intended to be sold as butter or for butter—and hence under the law was not oleomargarine and not taxable as oleomargarine. For the convenience of this court, said decision may be found in volume 297 of the Federal Reporter at page 644.

4 8. Plaintiff further states that as a result of said decision, Andrew W. Mellon, Secretary of the Treasury of the United States, approved, and David H. Blair, then Commissioner of Internal Revenue of the United States, published and promulgated Treasury Decision 3590, which was the text of the above decision, and further informed all concerned that Nut-Z-All had been held by the court not to be oleomargarine and not taxable as oleomargarine.

9. Plaintiff further states that in June, 1924, an organization or association of oleomargarine manufacturers known as the Institute of Margarine Manufacturers, maintaining headquarters in Washington, D. C., made inquiry of the said Commissioner of Internal Revenue, David H. Blair, and Deputy Commissioner of Internal Revenue, R. M. Estes, as to the taxability of the said product Nut-Z-All, and that the said Estes made reply as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, August 20, 1924.

NUT-Z-ALL

INSTITUTE OF MARGERINE MANUFACTURERS,
J. S. ABBOTT, *Secty.*,
1049 Munsey Building, Washington, D. C.

SIRS: Reference is made to your letters of June 18 and July 30, 1924, relative to the alleged advertisements and sale of Nut-Z-All by certain retailers as butter and as a substitute for butter, and requesting this office to take steps to bring the product within the classification of oleomargarine.

The product Nut-Z-All was held by this office taxable as oleomargarine but the decision was contested in the case of Higgins Manufacturing Company v. Page, 297 Fed. 644, wherein this product was held by the court to be not made in imitation or semblance of butter and not taxable as oleomargarine. The court having held the product to be not taxable as oleomargaine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law.

It is likely that the practice about which you complain is in violation of the statute of the States in which Nut-Z-All is being sold, and you may be able to obtain relief desired by applying to the State officials.

Respectfully,

(Signed) R. M. ESTES,
Deputy Commissioner.

MLN

10. Plaintiff further states that on April 1, 1927, said Andrew W. Mellon and David H. Blair, notwithstanding the aforesaid decision in the case of Higgins Manufacturing Company v. Page, the issuance of said Treasury Decision 3590 based thereon, and the statement contained in the above letter to the said Institute of Margarine Manufacturers that the said product Nut-Z-All was not taxable as oleomargarine, all of which were given extensive publicity throughout the trade, endeavored by Treasury Decision 4006 to again declare products similar to Nut-Z-All taxable as oleomargarine if colored to look like butter.

11. Plaintiff further states that in July, 1927, the said Higgins Manufacturing Company, of Providence, Rhode Island, filed in the United States District Court, District of hode Island, a petition for a temporary injunction against Frank A. Page, collector of internal revenue for the district of Rhode Island, asking the court to restrain the said collector of internal revenue from collecting a tax on Nut-Z-All and similar products as on oleo-

margarine, which injunction was granted by his honor, Judge Lowell, of the district of Massachusetts on July 18, 1927, said injunction being in words and figures as follows:

District Court of the United States, District of Rhode Island

HIGGINS MANUFACTURING COMPANY,

vs.

FRANK A. PAGE, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the Collection District of Rhode Island, et al.

The President of the United States of America—

To: Frank A. Page, individually and as collector of internal revenue of the United States for the collection district of Rhode Island, and his deputies, agents and successors,

Greetings:

Know ye, that in the above-entitled cause a motion for the issuance of a writ of preliminary injunction has been duly made, and the said motion, upon due consideration, has been granted by the court and such injunction ordered to issue:

Now, therefore, you are hereby restrained and enjoined, pending the hearing and determination of this cause, or until the further order of this court, from collecting, or attempting to collect from plaintiff any pretended tax or imposition purporting to be levied or assessed against the plaintiff under said oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209—as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of Higgins Nut Product; from
7 seizing any of the property of the Higgins Manufacturing Company because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid thereon; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of the plaintiff because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against the plaintiff, its property, officers, or agents and from notifying wholesale or retail dealers dealing in Higgins Nut Product in the collection district of Rhode Island that they will incur liability to a specific tax as dealers in artifically colored oleomargarine or from making public announcement that Higgins Nut Product is liable to a tax imposed on colored oleomargarine or that said product will be seized.

Witness my hand and the seal of the District Court of the United States for the District of Rhode Island at Providence, this 23rd day of July, A. D. 1927.

[SEAL] (Signed) ALICE PECKHAM, *Clerk.*

That at the time of granting said injunction Judge Lowell rendered an opinion, which for the information of this court may be found in 20 Fed. (2d), at p. 948.

12. Plaintiff further states that in July, 1927, the Baltimore Butterine Company, of Baltimore, Maryland, petitioned the Supreme Court of the District of Columbia for a temporary and permanent injunction against said Blair and Estes, to restrain them from endeavoring to enforce said Treasury Decision 4006 against
8 its nut product Nu-Ine, which was identical in content and appearance with plaintiff's Southern Nut Product and which was in content and appearance identical with Nut-Z-All. After hearing and due consideration, Justice Jennings Bailey of that court granted an injunction pendente lite, and rendered an opinion which is in words and figures as follows, to-wit:

"I agree with the reasoning of the decision of Judge Lowell of the District Court of Rhode Island in Higgins Manufacturing Co. v. Page, that is one of the cases to which the Supreme Court referred in Dodge v. Brady, 240 U. S. 122, of extraordinary and exceptional circumstances.

"The bill alleges that the substance Nu-Ine involved in this case is the same as Nut-Z-All which Judge Brown of the district court held not subject to taxation under the oleomargarine act. Yet in spite of this judicial holding the defendant has attempted by a regulation to make all substances like to that involved in this suit, taxable under the act. It is clear that the defendant by means of a mere regulation can not enlarge the provisions of the act, and such a regulation can not be enforced. There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury to the plaintiff would be irreparable and the amount inascertainable.

"The injunction will issue as prayed, restraining, pendente lite, the defendant from enforcing Treasury Decision No. 4006, in so far as it may apply to Nu-Ine."

On December 16, 1927, the same court, by Justice A. A. Hoehling, made said injunction permanent, the final decree being in words and figures as follows:

9 Final Decree

In the Supreme Court of the District of Columbia Holding an Equity Court

The Baltimore Butterine Company, a corporation, plaintiff,

versus

Andrew W. Mellon, Secretary of the Treasury; David H. Blair, Commissioner of Internal Revenue; R. M. Estes, Deputy Commissioner of Internal Revenue, defendants.

This cause coming on for final hearing, the plaintiff moved that, upon the pleadings and law applicable, the injunction pendente lite heretofore issued be made permanent, thereupon counsel for both sides having been heard and the matter having been considered by the court,

It is, this 16th day of December, A. D. 1927, adjudged, ordered, and decreed that the injunction pendente lite heretofore issued in this cause be, and the same hereby is made permanent.

By the court,

A. A. HOEHLING,
Associate Justice.

In December, 1927, Judge Lowell made permanent the temporary injunction theretofore granted against the said Frank A. Page, collector of internal revenue for the district of Rhode Island, as set out above. No appeals were taken by the Government from any of the above-mentioned decrees.

13. Plaintiff further states that, relying upon the said first decision in the case of Higgins v. Page, said Treasury Decision
10 3590, said letter of R. M. Estes, and the said injunctions set out above, it was warranted in believing that the question had been judicially determined, and that such products were not oleomargarine and not taxable as such, and it therefore engaged in the manufacture of Southern Nut Product. To further safeguard its business, however, plaintiff made inquiry of the Bureau of Internal Revenue and was advised by letter that Southern Nut Product would not be taxable as oleomargarine. Said letter read in part as follows:

"The Standard Nut Margarine Company has the same privilege of making a compound of the kind in question without tax-paying the same as oleomargarine as is being enjoyed by those manufacturers who obtained favorable decisions from the courts."

Upon receiving this letter, plaintiff began the manufacture of Southern Nut Product and has continued its manufacture in the same manner and of the same ingredients.

14. Plaintiff further states that on or about May 13, 1929, the Hon. William H. Barrett, United States district judge for the southern district of Georgia, in a case involving the question whether Southern Nut Product was an imitation of butter, decided that it was not an imitation of anything, saying:

"It must be borne in mind throughout that this article when placed in the streams of commerce by its manufacturer and when purchased by the consumer had nothing on its container to indicate that it was an imitation of anything, and certainly not of creamery butter. Instead of by implication or otherwise claiming to be the product of milk or cream it is affirmatively in its name indicated that it was derived from 'nut.' Not only did its name thus affirm-
11 atively indicate that it was no imitation of creamery butter but in extenso the words on the carton declared, 'This product is made from the very best vegetable fats and can not be excelled for cooking, baking, and shortening.' The alleged elements of imitation are (a) it is in square cartons containing one pound, (b) the pound is divided into four quarter-pound cubes and (c) it is colored exactly like creamery butter. It hardly can be contended that an article of food should not be sold in pound packages because some other article of food was sold in pound packages and it could hardly be contended that the adoption of the plan of dividing a pound of food into four cubes preempted such practice as against all other food producers, and it can hardly be contended that the color of creamery butter, even though it were always the same (contrary to the evidence), would preempt it as against all other foods of such color. It does not appear in the 'conclusion' nor was it urged at the hearing, that there was any reason for any purchaser of a carton of Southern Nut Product to be deceived into thinking that it was creamery butter. Apparently the defendant and Attorney General dealt with this as a package, for the language of the finding is that 'it is an imitation in package of another substance.' It is at least doubtful whether the sale in packages of a substance manufactured and put into commerce so marked as to prevent any reasonable conclusion that it was intended as an imitation of another article of food would come under the ban of this act because perchance some purchaser might, either as purchased or in some other way, use it either as an imitation of or as a substitute for another article of food."

Plaintiff further states that on or about November 1, 1929, one Peter Miller, collector at Jacksonville, Florida, at the instance of and under the instructions of the Commissioner of Internal Revenue, undertook to collect a tax of 10 cents per pound on
12 the manufacture of Southern Nut Product as upon the manufacture of artificially colored oleomargarine, and to require the wholesalers and retailers of said product to pay the special license fees of $480.00 and $48.00 per annum, respectively. That plaintiff filed a petition for injunction against such action on the part of said collector.

15. Plaintiff further states that on or about March 4, 1930, Hon. Lake Jones, of the United States District Court for the Southern District of Florida, granted a permanent injunction against said collector, as follows:

In the District Court of the United States For the Southern District of Florida, Jacksonville Division

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff,

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

In Equity No. 651–J

Final Decree

This cause having come on for final hearing and court having heard the evidence, and being duly advised of its judgment in the premises; it is

Ordered, adjudged, and decreed as follows:

1. The equities of this cause are with the complainant and against the defendant, and complainant is entitled to the relief prayed in the bill of complaint.

2. The court finds that the complainant has established the material allegations of the bill of complaint.

13 3. It is ordered that the temporary injunction granted in this cause under date of January 7th, A. D. 1930, be and the same is hereby made permanent and that said defendant, Peter H. Miller as collector of internal revenue for the district of Florida, be and he is hereby permanently restrained and enjoined as in said temporary injunction said defendant was heretofore enjoined.

Done and ordered at chambers at Jacksonville, Florida, this March 4th, A. D. 1930.

LAKE JONES, *District Judge.*

16. Plaintiff further states that thereafter on or about April 15th, 1930, defendant herein at the instance of and under the instructions of the said Commissioner of Internal Revenue, issued orders to his deputies to require all wholesale and retail dealers in the State of Georgia to pay special license taxes because of their sale of Southern Nut Product, as required by law upon the sale of oleomargarine. Defendant, through his agents and deputies, has asserted his intention of requiring the payment of this special oleomargarine tax by every wholesale and retail dealer who handles Southern Nut Product in the State of Georgia, and further to proceed in an effort against said dealers to collect penalties for failure to pay such licenses.

17. That said taxes are so great that rather than pay them said wholesale and retail dealers are threatening to discontinue and unless the relief prayed for herein is forthwith granted will discontinue the business of dealing in Southern Nut Product, and plaintiff's entire business in the State of Georgia will be ruined and destroyed. That such damage and injury is immediate and irreparable, and plaintiff has no adequate remedy at law, and that for said dealers to themselves pay the said taxes and bring actions at law to recover would necessitate a multiplicity of suits.

18. Plaintiff further states that the attempt of defendant herein to tax the dealers of Southern Nut Product as dealers of artificially colored oleomargarine will deprive plaintiff of its property without due process of law, as guaranteed by the Constitution of the United States.

19. Plaintiff further states that section 2 of the act of August 2, 1886, as passed by Congress, is as follows:

"SEC. 2 (act Aug. 2, 1886). That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow beef fat, suet, lard, lard-oil, vegetable oil annatto, and other coloring matter, intestinal far, and offal fat made in imitation of semblance of butter, or when so made, calculated, or intended to be sold as butter, or for butter."

20. Plaintiff further states that Southern Nut Product is composed entirely of vegetable oils, salt, water, and harmless coloring matter, the same as the products Nut-Z-All and Nu-Ine, there being no element of animal nature contained therein. That under the provisions of section 2 of the said act of August 2, 1886, as passed by Congress, only animal elements were included in the definition of oleomargarine; and that the act of defendant in attempting to make taxable products composed entirely of vegetable ingredients is not justified or authorized by said act.

Prayer

Wherefore, plaintiff, being without remedy in the premises except in a court of equity, prays:

1. That writs of subpœna issue directed to defendant herein commanding him to appear and make full, true, and complete answer to this the plaintiff's bill of complaint, but not under oath, his said answer under oath being expressly waived, and to abide by and perform such order or decree as the court may make in the premises.

2. That defendant, his agents, assistants, deputies and employees be temporarily restrained from directly or indirectly collecting, or attempting to collect, from any dealers selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed as special license taxes under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209—as amended by act of May 9, 1902, chapter 784, sec. 332, 32 Stat. L. 194) on account of the sale of the said product, Southern Nut Product, referred to in the petition herein; from seizing any of the property of plaintiff or said dealers because said alleged license taxes have not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff or said dealers because said special license taxes have not been paid; from enforcing any of the remedies provided
16 for the collection of internal revenue of the United States against the plaintiff, its said dealers, its property, officers or agents, with respect to said product, Southern Nut Product; from notifying wholesale or retail dealers in said nut product that because of the sale of the said nut product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from asking public announcement that the said dealers in said nut product manufactured by plaintiff herein are liable to the taxes imposed on the sale of colored oleomargarine.

3. That upon the hearing of the application hereby made for a preliminary injunction, a preliminary injunction may be issued against the defendant, his agents, assistants, deputies, and employees, enjoining them, pending final hearing of this cause, from collecting, or attempting to collect, directly or indirectly, from the plaintiff, or any dealer selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209—as amended by act of May 9, 1902, chapter 784, sec. 332, 32 Stat. L. 194) on account of the manufacture or sale of the said product, Southern Nut Product, referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein or of said dealers because an alleged tax on the sale of said product, Southern Nut Product, manufactured by plaintiff has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff or said dealers because any alleged tax has not been paid on the sale of said product, Southern Nut Product; from enforcing any of the remedies provided for the collection of internal revenue of the United States against plaintiff, its property, officers, or agent, of said dealers
17 with respect to the sale of said product, Southern Nut Product, from specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said nut product manufactured by plaintiff herein is liable to the tax imposed on colored oleomargarine.

4. That plaintiff have such other, further, and general relief as the nature of the case may require, and the court may deem just and proper in the premises.

STANDARD NUT MARGARINE CO. OF FLORIDA,
By W. E. NICHOLSON,
Secretary-Treasurer.
GEORGE N. MURDOCK,
JAS. C. DAVIS,
Attorneys for Plaintiff.

[*Duly sworn to by W. E. Nicholson. Jurat omitted in printing.*]

18 In United States District Court

Order to show cause

Filed May 2, 1930

Let this petition be filed and a hearing had at Atlanta on May 5, 1930, or so soon thereafter as the case can be reached the defendant now appearing and consenting to the hearing.

May 1, 1930.

SAM'L. H. SIBLEY,
U. S. Judge.

Acknowledgment of service

Service of the foregoing bill and order thereon is hereby acknowledged. Issuance of process is waived.

This May 2d, 1930.

C. P. GOREE,
Assistant U. S. Attorney and Solicitor for Defendant.

In United States District Court

Now comes the defendant, Josiah T. Rose, individually and as collector of internal revenue for the district of Georgia, and files these, his defenses, to the bill of complaint herein, reserving unto himself the benefit of all necessary objections and exceptions to the errors and insufficiencies of said bill and the jurisdiction of the court, nevertheless answering so much and such parts of the bill as he is advised it is material or necessary for him to answer, that is to say:

Motion to strike parts of plaintiff's bill

The defendant respectfully moves the court to strike from said bill paragraphs 7, 8, 9, 11, 12, 13, 14, and 15.

19 (a) Because said paragraphs do not furnish any basis for proper pleadings.

(b) Because the allegations contained in said paragraphs are argumentative, impertinent, immaterial, and irrelevant.

A [Caption omitted]

In United States District Court, Northern District of Georgia, Northern Division

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

JOSIAH T. ROSE, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Georgia, defendant

In Equity No. 575

Bill of complaint

Filed May 2, 1930

Plaintiff states as follows:

1. The plaintiff, the Standard Nut Margarine Company of
2 Florida, is a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at Jacksonville, Florida, and is a citizen of the United States of America and the State of Florida.

2. The defendant, Josiah T. Rose, is a citizen of the State of Georgia, and a resident of the city of Atlanta, Georgia, and is collector of internal revenue for the District of Georgia.

3. Plaintiff states that this suit arises under the Constitution and laws of the United States and involves the validity, construction, application and enforcement of the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law.

4. That the suit involves property rights of plaintiff in excess of three thousand ($3,000.00) dollars, exclusive of interest and costs.

5. Plaintiff further states that it is engaged in the manufacture and sale in interstate commerce of a nut product known as Southern Nut Product, manufactured and sold under its own distinctive name, said name not being an imitation of the distinctive name of any other product; that said name is accompanied on the same label or brand with the name of the place where it is manufactured or produced; and that said product contains no added poisonous or deleterious ingredients. Southern Nut Product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, manufactured and sold for cooking, baking, and seasoning purposes; that said product, Southern Nut Product, is packed and sold only in one-pound cartons, a sample of which is attached hereto and made a part hereof; that in the said manu-
3 facture of Southern Nut Product, plaintiff buys the materials so used in manufacturing same from a great many persons

Further answering paragraph 13 of plaintiff's bill defendant admits that plaintiff wrote the Commissioner of Internal Revenue as set forth in said paragraph, but defendant denies that the reply purported to have been written by R. M. Estes, Deputy Commissioner of Internal Revenue, was as set forth in said paragraph, and alleges that the same is misleading and not a true statement of facts for the reason that the balance of said letter states that the commissioner considers said products taxable and further advises that while said products are considered taxable no attempt is being made at the present time to collect the tax thereon.

23 Further answering paragraph 13 of plaintiff's bill, the defendant alleges that when the so-called cooking compound products were first submitted to the department for analysis the representation was made that these products were to be manufactured and sold as cooking compounds. An analysis of said products was made and the contents determined, and as a result thereof the Commissioner of Internal Revenue held said products to be artificially colored oleomargarine and within the purview of the act of August 2, 1886, as amended; that all of the manufacturers of said products who submitted samples, together with others who did not submit samples, proceeded to manufacture said products, and instead of placing said products upon the market as cooking compounds for baking and cooking said manufacturers immediately began to advertise to the world that said products were substitutes for butter and through their activities, a market was eventually created wherein these products began to show keen competition to butter and oleomargarine products, and as time went on more and more of the products began to appear upon the market under various and sundry names until the Higgins Manufacturing Company of Providence, Rhode Island, decided to test the question of the taxability of its product in court. The Higgins Company paid the tax on its product and brought suit to recover, and the court on the showing in that case determined that the product submitted was not made in imitation or semblance of butter or when so made calculated or intended to be sold as butter or for butter and that same did not have the flavor or texture of butter. The commissioner, however, contends that all of said products when made in imitation or semblance of butter or placed upon the market and sold in imitation or semblance of butter or have the texture and flavor of butter are taxable. It is true that subsequent to the trial of the

24 first Higgins case the department did write certain letters to various manufacturers giving them permission to go ahead and manufacture said products as cooking compounds. Each of said letters stated in substance that the department held the products when made in imitation or semblance of butter or calculated or intended to be sold as butter or for butter to be within the purview of the act, but that in view of certain court decisions various manufacturers had the same privilege of manufacturing the products as

cooking compounds as did the Higgins Manufacturing Company, it being expressly understood that the Higgins people had no right or permission to manufacture its products tax free if the same were to be placed on the market as butter substitutes or if same were calculated or intended to be sold as butter or for butter. The commissioner at no time held any of said products nontaxable, nor has the commissioner at any time overruled any decision which he has made, and it is affirmatively alleged that the commissioner has at all times contended that all the various cooking compounds which have been manufactured and placed on the market by various manufacturers have been and now are subject to the provisions of the oleomargarine act of August 2, 1886, as amended, when such products are shown to be manufactured and sold and intended and calculated to be manufactured and sold in imitation or semblance of butter or for butter or as butter, and the defendant herein affirmatively alleges that all of the products mentioned and described in plaintiff's bill were manufactured and sold and intended and calculated to be manufactured and sold not as cooking compounds but as butter or for butter and that the same were sold as butter and for butter, and in support thereof are attached hereto marked "Exhibit A" and made a part hereof by reference the affidavits of James H. Higgins, jr., and Jessie C. Francis, it being further affirmatively alleged that said products are not cooking compounds nor could the same be used as ordinary and recognized cooking compounds, but that when said products are used as cooking compounds they are used in the place of butter.

14. Answering paragraph 14 of the bill, defendant admits that Judge Barrett rendered a decision as set forth in said paragraph but denies that said cause or said decision involves the question of the taxability of said Southern Nut Product, and alleges that the same involves the question of misbranding under the Georgia State law.

Defendant further admits that an action was filed by plaintiff on or about November 1, 1929, against Peter H. Miller, collector of internal Revenue, Jacksonville, Florida, to restrain him from collecting a tax of ten cents per pound upon plaintiff's product known as Southern Nut Product and that on March 4, 1930, the Honorable Lake Jones rendered an opinion a copy of which is hereto attached, marked "Exhibit B" and made a part hereof by reference. That said court did not pass nor attempt to pass on the taxability of said products. Defendant affirmatively alleges that on or about the 15th day of April, 1930, the defendant in said action, Peter H. Miller, collector of internal revenue for the district of Florida, took an appeal from said decree rendered against him and in favor of the plaintiff to the Circuit Court of Appeals for the Fifth Circuit which appeal is now pending and that on or about the 15th day of April, 1930, the Honorable Lake Jones, district judge of the United States District Court for the Southern District of Florida at Jacksonville,

entered an order allowing said appeal and at the same time and place suspended during the pendency of said appeal the effect of said final decree. Copies of said appeal papers are attached hereto
26 and made a part hereof by reference and marked "Exhibit C." Said appeal is now being prosecuted and will be prosecuted to final decision in said circuit court.

15. In answer to paragraph 15 of plaintiff's bill, the defendant admits that the decree therein set forth was rendered by the United States District Court for the Southern District of Florida, and affirmatively alleges that said decree is not now in force and effect, but that the same has been suspended pending determination of said appeal taken from said decree to the United States Circuit Court of Appeals for the Fifth Circuit, and affirmatively alleges that Judge Jones in his opinion made no attempt whatsoever to pass upon the taxability of said product, and affirmatively alleges that there was no evidence of any character or description presented to the court in said proceeding upon which the court could pass upon the taxability.

16. In answer to paragraph 16 of plaintiff's bill, defendant states that on or about April 15, 1930, defendant received from Honorable Robert H. Lucas, Commissioner of Internal Revenue, Washington, D. C., advice to the effect that the commissioner held Southern Nut Product to be artificially colored oleomargarine and within the purview of the act of August 2, 1886, as amended, and, no court of competent jurisdiction having found said product nontaxable by virtue thereof, all dealers and persons handling said product within the district and State of Georgia were subject to special license taxes as such, and that upon such ruling from the Commissioner of Internal Revenue defendant proceeded to collect said taxes and license fees as he is authorized so to do in such cases as provided by the act of August 2, 1886, as amended, known as the oleomargarine law.

17. Answering paragraph 17 of plaintiff's bill, defendant denies the allegations therein set forth.

27 18. Answering paragraph 18 of plaintiff's bill, defendant denies the allegations therein contained.

19. Answering paragraph 19 of plaintiff's bill, defendant admits that section 2 of the act of August 2, 1886, is as set forth therein.

20. Answering paragraph 20 of plaintiff's bill, defendant denies the allegations therein contained.

Further answering plaintiff's bill of complaint, and as a separate and distinct answer thereto, defendant affirmatively alleges that this court is without jurisdiction to restrain the collection of the tax which has been asserted by the commissioner against said products and against the wholesalers and dealers handling the same on the ground and for the reason—

(a) The prohibition of section 3224 of the Revised Statutes of the United States, and

(b) The plaintiff and its dealers handling said product have a complete and adequate remedy at law.

Defendant, further answering plaintiff's bill of complaint and as a separate and distinct answer thereto, affirmatively alleges that the collection of taxes now sought to be enjoined are, and are hereby claimed as property of the United States and that the United States is the real party in interest in this litigation and is therefore, an indispensable party to this action, and not having been made a party this court has no jurisdiction to proceed with said cause.

Further answering plaintiff's bill of complaint and as a separate and distinct answer thereto, the defendant alleges that the United States is an indispensable party to said cause in that the matters and things complained of in plaintiff's petition can not be
28 fully determined and adjudicated without the United States being made a party by reason of the fact that the United States under the laws of the United States has a right to proceed to collect its revenue by suit, which is a method entirely separate and distinct from the threatened proceeding complained of against the collector, the defendant in this action.

Defendant, further answering plaintiff's bill of complaint and as a separate answer thereto, affirmatively alleges that the Commissioner of Internal Revenue being vested with discretionary powers under the provisions of section 14 of the act of August 2, 1886, as amended, and said commission having determined plaintiff's product to be a substance and mixture within the purview of said act and said commissioner having found that said product is artificially colored oleomargarine, and the tax thereon having been duly and regularly assessed by said commissioner according to law, and Southern Nut Product being different from the product that was before the District Court of the United States for the District of Rhode Island in the case of Higgins Manufacturing Company v. Page, Collector, Law No. 1548 of the records of that court, in that the product there before the court was packed in triangular-shaped packages and had an entirely different taste, texture, and color from Southern Nut Product, and in support of which there is attached hereto, marked "Exhibit D," and made a part hereof by reference the affidavit of George F. Beyers, Government chemist, who has analyzed and examined both Southern Nut Product and Higgins nut product, and by reason of Southern Nut Product being an entirely different product from the product before the court in the Higgins case and no court having determined Southern Nut Product to be nontaxable, this court is without jurisdiction to review the acts of the Commissioner
29 or to restrain the collection of dealers license taxes which become as a matter of law due and payable as a result of the commissioner's finding that said product is artificially colored oleomargarine and taxable.

Further answering plaintiff's bill of complaint and as a separate and distinct answer thereto, defendant affirmatively alleges that said bill of complaint fails to state a cause of action against this defend-

ant and further fails to disclose any interest, legal or otherwise, of plaintiff in the subject matter of said litigation, and by reason thereof the action should be dismissed.

Wherefore, having fully answered the plaintiff's bill of complaint, the defendant prays that the prayers of plaintiff's bill be denied; that no preliminary or permanent injunction issue as prayed for, and that the bill be dismissed with costs to the plaintiff.

CLINT W. HAGER,
United States Attorney.
C. F. GOREE,
Assistant United States Atty.
HANSON F. MCCOWEN,
Attorney, General Counsel's Office,
and Solicitors for Defendant.

[*Duly sworn to by Josiah T. Rose. Jurat omitted in printing.*]

30 *Exhibit A to answer*

STATE OF MASS.,
County of Suffolk, ss:

James W. Higgins and Jesse G. Francis, being both duly sworn according to law, depose and each for himself says:

That they are deputy collectors of internal revenue for the United States and are assigned to the investigation of violations and infractions of the oleomargarine law of the United States.

That they are familiar with various and sundry brands of so-called artificially colored cooking compounds, and are especially familiar with a certain product manufactured by the Standard Nut Margarine Company of Florida at Jacksonville, Florida, known as Southern Nut Product.

That during the course of their investigation they purchased on March 16, 1930, one pound of Southern Nut Product as butter from H. E. Ferguson, East Belmont, North Carolina, for which they paid forty cents; that on April 16, 1930, at Charlotte, North Carolina, they purchased Southern Nut Product as artificially colored oleomargerine from Chicago Market Store #80, 205–7 E. Trade Street, Charlotte, North Carolina, for which they paid the sum of thirty cents for said pound package; that on said date they also purchased Southern Nut Product as cheap butter from 50–50 Self-Service Store, 234 E. Trade Street, Charlotte, North Carolina,
31 for which they paid the price of thirty-three cents per pound package; that on April 17, 1930, they purchased Southern Nut Product as colored oleomargarine from F. C. Moore, 275 Ashland Avenue, Asheville, North Carolina, for which they paid thirty-five cents for a one-pound package; that on the same date they purchased one pound of Southern Nut Product from Teague's Market, 724 Haywood Road, Asheville, North Carolina, as colored oleomargarine and paid thirty-five cents for the one-pound package; that

on the same date they purchased one pound of Southern Nut Product as colored oleomargarine from Piggly-Wiggly-Williams Company Store No. 6, 252 Charlotte Street, Asheville, North Carolina, for which they paid thirty-four cents; that on April 18, 1930, they purchased one pound of Southern Nut Product as colored oleomargarine from Caldwell's Market, 1900 Main Street, Columbia, South Carolina, for which they paid a price of thirty-five cents for the one-pound package; that on the same date they purchased one-half pound of Southern Nut Product as butter from Threatts American Cafe, 1218 Taylor Street, Columbia, South Carolina, for which they paid the sum of thirty cents for the one-half pound; on the same date four butter pats of Southern Nut Product were served to us as butter at Threatts American Cafe, 1218 Taylor Street, Columbia, South Carolina, which butter pats of Southern Nut Product were served with dry toast; that on April 21, 1930, they purchased a one-pound package of Southern Nut Product as creamery butter from Dixie Stores, 920 Washington Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Dixie Stores, Boucomb Road, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of
32 Southern Nut Product as nut butter from M. J. Worley, Boucomb Road, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Dixie Stores, Rutherford Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as good butter from the Piedmont Grocery, Rutherford Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as cheap butter from Piggly Wiggly Store, 121 Main Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as nut butter from Peoples Store, 9 Pendleton Street, West Greenville, South Carolina, for which they paid thirty-five cents; that on or about April 22, 1930, they purchased a one-pound package of Southern Nut Product as nut butter from Dutch Market, 161 Rutledge Avenue, Charleston, South Carolina, for which they paid thirty-five cents; that on or about April 22, 1930, the [they] purchased a one-pound package of Southern Nut Product as cheap butter from F. Seebeck, 107 Rutledge Avenue, Charleston, South Carolina, for which they paid thirty-five cents. That on or about April 22, 1930, they purchased a one-pound package of Southern Nut Product as good butter from C. Bowick, 82 Calhoun Street, Charleston, South Carolina, for which they paid forty cents; that on or about April 22, 1930, they purchased a one-pound package

of Southern Nut Product as butter from W. F. Groveman, 54 Chapel Street, Charleston, South Carolina, for which they paid thirty-nine cents; that on or about April 22, 1930, they purchased a one-
38 pound package of Southern Nut Product as butter from Tony Papoulos, Reed & Meeting Streets, Charleston, South Carolina, for which they paid thirty-five cents; that on April 26, 1930, they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Clover Farms Stores, East Point, Georgia, for which they paid thirty-five cents; that on April 26, 1930, they purchased a one-pound package of Southern Nut Product as cheap butter from P. Aramson, 221 Forrest Avenue, Atlanta, Georgia, for which they paid thirty-five cents; that on April 26, 1930, they purchased a one-pound package of Southern Nut Product as nut butter from N. Warshaw, 51 W. Linden Avenue, Atlanta, Georgia, for which they paid thirty cents; that on April 30, 1930, the purchased a one-pound package of Southern Nut Product as good butter from C. H. Hutman, E. Broad and Julian Streets, Savannah, Georgia, for which they paid thirty cents; that on April 30, 1930, they purchased a one-pound package of Southern Nut Product as colored oleomargarine from S. Lowenkopt, E. Broad and President Streets, Savannah, Georgia, for which they paid thirty-five cents; that on April 30, 1930, they purchased a one-pound package of Southern Nut Product as cheap butter from C. Dulohery, 519 E. Broad Street, Savannah, Georgia, for which they paid thirty-five cents; that on April 30, 1930, they purchased one-half pound of Southern Nut Product as nut butter from Hubbard's, 37th and E. Broad Streets, Savannah, for which they paid twenty cents; that on April 30, 1930, they purchased a one-pound package of Southern Nut Product as nut butter from R. Oglesby, 40th & Drayton Streets, Savannah, Georgia, for which they paid thirty-five cents; that on May 1, 1930, they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Kings Self Service Grocery #1, 1001 Broadway, Columbus, Georgia, for which they paid forty cents; that on May 2, 1930, they purchased a one-pound pack-
34 age of Southern Nut Product as cheap butter from Cooks Market #2, 122 W. Broad Street, Griffin, Georgia, for which they paid thirty-five cents; that on May 2, 1930, they purchased a one-pound package of Southern Nut Product as cheap butter from Brannon Grocery Company, 116 W. Broad Street, Griffin, Georgia, for which they paid thirty-five cents.

That all of said product so purchased was packed in packages similar in size and character to those ordinarily used manufacturers of creamery and dairy butter. That the contents of the packages were divided into four quarter-pound sticks, the same as butter is packed and sold upon the market, each quarter-pound stick being wrapped separately in tissue paper.

That on the 18th day of April, 1930, during the course of said investigation, we called on Threatts American Cafe, 1218 Taylor

Street, Columbia, South Carolina, and ordered a meal; there was served to us as butter what we later learned was Southern Nut Product; that as a result of securing such information the proprietor, L. I. Threatt, executed an affidavit to the effect that he was serving Southern Nut Product to his customers as butter, said affidavit being attached hereto and marked "Exhibit X."

That during the course of our investigation, on March 15, 1930, there appeared in the Savannah Morning News the following advertisement, which was published and distributed generally throughout the locality of Savannah Georgia:

"Southern Nut, better than butter. Try a 10¢ stick in comparison with the best creamery butter on hot biscuit or waffles. If you can tell the difference, I will refund the money, 35¢ pound. Ask your grocer or phone 3-3491."

35 Further affiant sayeth not.

JAMES W. HIGGINS, Jr.
JESSE G. FRANCIS.

Subscribed and sworn to before me this 14th day of May, 1930.

[SEAL.] JOHN T. HANSON,
Notary Public.

Exhibit X to affidavit

COLUMBIA, S. C., *April 19, 1930.*

This is to certify that I am the owner and manager of Threatts American Cafe located at 1218 Taylor St., Columbia, South Carolina, and that I am now and have been serving to my customers as butter with their meals, Southern Nut Product, packed in one (1) pound cartons of four (4) one-quarter (¼) pounds cubes individually wrapped, and that all of my customers seem to be satisfied as I have not as yet had a complaint.

(Signed) L. I. THREATT,
1218 Taylor St., Columbia, South Carolina.

Sworn and subscribed to this 19th day of April, 1930.

JESSE G. FRANCIS,
Deputy Collector.

Attest:

JAS. W. HIGGINS, Jr.,
Deputy Collector.

36 In United States District Court

Order continuing case until May 24, 1930

Filed May 9, 1930

It is ordered by the court that the hearing for preliminary injunction in this case be continued until May 24, 1930, at 10 o'clock a. m., and that defendant file his answer by May 20, 1930, and in the mean-

time refrain from taking any steps toward the collection of the oleomargarine license taxes sought to be enjoined by the petition herein.

This May 9, 1930.

SAM'L H. SIBLEY,
United States Judge.

We consent to the above order.

GEORGE N. MURDOCK,
JAS. C. DAVIS,
Solicitor for Plaintiff.
C. P. GOREE,
Assistant United States Attorney, and Solicitor for Defendant.

Order continuing case until May 24, 1930, omitted from the printed record, being heretofore copied at page 36.

* * * * * * *

In United States District Court

Opinion denying preliminary injunction

Filed June 2, 1930

37 Evidence and argument has been had on a motion for preliminary injunction to prohibit the collector of internal revenue for Georgia from "collecting or attempting to collect from the plaintiff, or any dealer selling plaintiffs product, Southern Nut Product, any pretended tax assessed under the oleomargarine act of August 2nd, 1886, as amended." The case made is that plaintiff manufacturers Southern Nut Product in Jacksonville, Florida, and has an established business in Georgia, with numerous jobbers and retailers who sell it and who are about to be taxed as such sellers on the ground that Southern Nut Product is oleomargarine under the definitions of section 2 of said act, and that dealers, for fear of the tax, are refusing to handle plaintiff's goods and its business is about to be destroyed. The contention is that taxed oleomargarine is based only on animal fats, and plaintiff's product contains only vegetable oils, and that several courts have so decided. The respondent's case is that the definition in section 2 of the act, properly construed includes imitations of butter made from vegetable oils, and that the Commissioner of Internal Revenue, under section 14 of the act, has held this product to be taxable, and that it is in fact made and sold as butter substitute. He denies that any court has finally adjudged plaintiff's product to be not taxable.

The controlling contentions are that R. S. 3224, now 26 U. S. Code 154, prohibits the granting of injunction; that there is an adequate remedy at law by paying the tax and suing for its recovery, and that plaintiff has no interest in the proposed tax against the dealers.

Considering the last contention first, while it is true that the plaintiff is not itself a dealer in Georgia so as to be taxed there, and while only the property of the dealer, or his interest in it, can be distrained

upon or can be forfeited under section 18 of the act, so that
38 plaintiff's physical property can not be affected, yet its interest in an established business is a property right the unlawful destruction of which a court of equity might properly prohibit. The plaintiff, though not the person directly proceeded against, may complain. Hewin v. Atlanta, 121 Ga. 723, 736; Traux v. Raich, 239 U. S. 33.

As to the presence of an adequate remedy at law the ruling must also be with the plaintiff. The remedy by suit and recovery of the tax is afforded to the dealer who is taxed, and not to the plaintiff, whose business is interfered with and who is not a party to the tax. The plaintiff has no legal right to pay the tax for the dealer or to use his name in a suit to recover it. The dealer may prefer not to involve himself in the controversy. Since the damage done would be really incapable of computation if the business were unlawfully destroyed, a case for interference by equitable prevention would generally exist. Compare Truax V. Raich, 239 U. S. 33.

26 U. S. Code 154 reads: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court." The constitutionality of this prohibition was sustained in Pullan v. Kinsenger, Fed. Cas. 11463, and seems not to have been questioned since. Many of the discussions in cases applying it have dwelt upon the adequacy of the remedy offered by 26 U. S. Code 156, by payment of the tax and suit for its recovery, a remedy not applicable here. Nevertheless the positive, sweeping language of sec. 54, it seems to me, can not be judicially amended to except cases in which the remedy by payment and recovery is applicable. The effect of it is to withdraw from the courts the power to use the equitable remedy of an injunction to prevent the assessment or collection of any tax. The remedy of damages for any unlawful act of course remains. Whatever may be said concerning the Supreme Court,
39 which is established by and derives its powers from the Constitution, the district court is given its powers by Congress. Congress may not give it more power than the Constitution permits, but the court has only what the acts of Congress grant. United States vs. Hudson, 7 Cranch 32; Stevenson v. Fain, 195 U. S. 165. The remedy of original mandamus to coerce official action has been silently withheld. McIntire v. Wood, 7 Cranch 505; Covington Co. v. Hager, 203 U. S. 109. The remedy by injunction to interfere with one form of official action is here expressly withheld. Injunctive relief regardless of actual irremediable damage was much restricted in labor disputes by the Clayton Act, 29 U. S. Code, sec. 52. "Shall the thing formed say to him that formed it, Why hast thou made me thus?" If power is given it will be exercised by the court according to law, and constitutional law will be administered even against the expressed will of Congress, when the two conflict. But when power is withheld the district court can not exercise it no matter what private wrong may result. The Supreme Court has spoken somewhat vaguely of "extraordinary and entirely exceptional cir-

In United States District Court

Answer

Filed May 20, 1930

1. He admits the allegations of paragraph 1 of plaintiff's bill.
2. He admits the allegations of paragraph 2 of plaintiff's bill.
3. He admits the allegations of paragraph 3 of plaintiff's bill.
4. In answer to paragraph 4 of plaintiff's bill, defendant denies the allegations therein set forth and contained.
5. Answering paragraph 5 of the bill, defendant admits that plaintiff is engaged in the manufacture and sale of a nut product known as Southern Nut Product but denies it is manufactured and sold under its distinctive name; denies any knowledge or information sufficient to form a belief as to whether said name is in imitation of the distinctive name of any other product or not. He admits that the name is accompanied on the label or brand with the name of the place where it is manufactured and produced; admits that said product contains no added poisonous or deleterious ingredients; admits that said product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, and harmless coloring matter, but denies that the same is manufactured and sold for cooking, baking, and reasoning purposes, and affirmatively alleges that said product is manufactured, sold, and calculated and intended to be manufactured and sold in imitation or semblance of butter and when so made is calculated and intended to be sold as butter or for butter; defendant admits that said Southern Nut Product is packed in one-pound cartons, but denies that knowledge or information sufficient to form a belief as to whether that is the only method or manner of packing said product; defendant denies any knowledge or information sufficient to form a belief as to whether plaintiff in the manufacture of said Southern Nut Product buys the materials so used in the said manufacture from a great many persons and firms located outside the State of Florida where the product is manufactured and sells and ships said product to a great number of firms and persons located in many States of the United States outside of the State of Florida, and, therefore, neither admits nor denies same, and demands strict proof thereof.
6. Answering paragraph 6 of plaintiff's bill, defendant denies that plaintiff has been engaged in the manufacture of said Southern Nut Product for a period of three years as alleged in said bill, and alleges that the plaintiff has not been engaged in such manufacture for a period of much over a year; defendant admits that plaintiff operates a plant and maintains offices in the city of Jacksonville; denies any knowledge or information sufficient to form a belief as to whether plaintiff had built up a reputation and standing for fair dealing with its customers and other people with whom it has done business, and demands strict proof thereof.

7. Answering paragraph 7 of plaintiff's bill, defendant admits that prior to plaintiff engaging in the manufacture and sale of said Southern Nut Product an action at law was brought
21 against one Page, collector of internal revenue for the district of Rhode Island for the recovery of taxes paid by the Higgins Manufacturing Company on a product known as Nut-Z-All. Denies said product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured. The defendant admits that the decision in said case is found in volume 297 Federal Reporter, page 644.

8. Answering paragraph 8 of plaintiff's bill, defendant admits that Treasury Decision 3590 was promulgated and published, but as to whether or not all concerned were informed that Nut-Z-All had been held by the court as not to be oleomargarine, defendant denies any knowledge or information and neither admits nor denies the same, and demands strict proof thereof.

9. Answering paragraph 9 of plaintiff's bill, defendant admits that in June, 1924, an organization or association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, maintained headquarters in Washington, D. C., and that inquiry was made by said institute to David H. Blair, then Commissioner of Internal Revenue, as to the taxability of said product Nut-Z-All; defendant admits that a letter set forth in paragraph 9, signed by R. M. Estes, deputy commissioner, was addressed to the Institute of Margarine Manufacturers, dated August 20, 1924.

10. Answering paragraph 10 of plaintiff's bill, defendant admits that Treasury Decision 4006 was promulgated and published, but alleges that said Treasury Decision 4006 was revoked according to law and that the same had been revoked for some considerable period of time before the filing of this action and is no longer in force and effect.

22 11. He admits the allegations of paragraph 11 of plaintiff's bill, save and except defendant denies injunction was asked for on similar products.

12. Answering paragraph 12 of plaintiff's bill, defendant admits that the Baltimore Butterine Company filed petition for injunction in the Supreme Court of the District of Columbia, but denies that the product Nu-ine manufactured by the Baltimore Butterine Company is the same as Southern Nut Product or that it is the same as Nut-Z-All. The defendant admits the court issued an injunction in said cause, but denies that the court passed upon the taxability of said products or was asked to pass upon the taxability of said products, and it is affirmatively alleged herein that the court was simply passing upon Regulation 4006.

13. Answering paragraph 13 of plaintiff's bill, defendant denies that plaintiff was warranted in believing, or that plaintiff did believe, that the taxability of its product had been judicially determined by the decision in the Higgins case or the decision of Justice Bailey in the Baltimore Butterine case.

cumstances" which may render the provisions of section 154 applicable, in Dodge v. Osborne, 240 U. S. 118 and Hill v. Wallace, 259 U. S. 44, but the actual decisions in these cases do not help this one. In the former the section was strictly applied. In the latter it was disregarded, but properly on the ground that the so-called taxes under the future trading act of August 24th, 1921, were really penalties, and that law was really a regulatory measure and not a tax act. Section 154 leaves but one question open in a case like the present, to-wit: Is the exaction a tax? The answer was negative in Hill v. Wallace, supra. So in numerous cases respecting so-called taxes under the national prohibition act. Lipke v. Lederer, 259 U. S. 557; Regal Drug Corp. v. Wardell, 260 U. S. 386. In Dodge v.
40 Brady, 240 U. S. 122, disregard of section 154 by the lower court in taking jurisdiction was condoned because a right result was reached in dismissing the bill on the merits, the point on controversy having meanwhile been settled by a decision of the Supreme Court itself. Many courts have held that an unconstitutional tax is not a tax within the meaning of such statutes, so that a controversy as to constitutionality can be accomplished by injunctive relief. But in Dodge v. Osborne, supra, it was held that injunction could not be had under this statute even in such a controversy. That impositions under the oleomargarine act are taxes and valed as such has been settled in In re Kollock, 165 U. S. 526, 536; McCray v. United States 195 U. S. 27. Whether one selling plaintiff's product is subject to the tax is the ordinary question of fact which arises under all tax acts, and which, under the scheme of Federal Law, is to be solved in the first instance by the tax officials without interference by Court injunctions. In Long v. Rasmussen, 281 Fed. 236, the injunction sought was not against the collection of the tax, but only to protect special property of a third person which had been wrongfully seized. In Higgins Mfg. Co. v. Page, 20 F(2) 948, the non-taxability of the very subject of litigation had been judicially determined in a suit between the same parties. The effort to tax notwithstanding the judgment made a very exceptional case. It is not this case, for the only litigation with this plaintiff about this product is still pending on appeal and has resulted in no final adjudication either way. The preliminary injunction must be refused.

This 2nd day of June, 1930.

SAM'L. H. SIBLEY,
U. S. Judge.

41 In United States District Court

Defendant's motion to dismiss suit

Filed Aug. 11, 1930

Now comes the above-named defendant, J. T. Rose, individually and as United States collector of internal revenue for the district

of Georgia by his solicitor, C. P. Goree, assistant United States attorney, and respectfully moves this honorable court to dismiss the above-named plaintiff's bill filed against this defendant in the above-entitled case on the 2nd day of May, 1930, upon the following ground, to wit:

This court has no power or authority to grant the relief prayed for in said bill of complaint, and is without jurisdiction to grant the same.

Wherefore, defendant prays judgment of the court.

C. P. GOREE,
Assistant U. S. Attorney and Solicitor for Defendant.

In United States District Court

Order dismissing case

Ordered and decreed that—
[redacted] foregoing motion be sustained and that said case be and the same [redacted] by dismissed—this September 19, 1930.

SAMUEL H. SIBLEY,
Judge U. S. Court.

42 In United States District Court

Petition for appeal

Filed Oct. 8, 1930

Now comes the Standard Nut Margarine Company of Florida, the plaintiff in the above-entitled cause, and respectfully shows the following facts:

Said cause was an action brought by the Standard Nut Margarine Company of Florida, a corporation, as complainant, against Josiah T. Rose, individually and as collector of internal revenue for the district of Georgia, to obtain a restraining order and an injunction restraining him from undertaking to collect a license tax from certain dealers in the State of Georgia handling a food product known as Southern Nut Product manufactured by complainant. A rule nisi was granted, and by agreement an order was taken prohibiting the collection of said license tax by defendant until the matter could be heard by the judge of the district court.

A hearing was had upon the prayer for preliminary injunction before the judge of the district court on the 24th day of May, 1930, and on June 2nd, 1930, said judge of the district court entered an order denying the preliminary injunction. Thereafter on the 19th day of September, 1930, the United States attorney filed in said court a motion to dismiss the petition in said case, and on the 19th day of September, 1930, the prayers of the motion to dismiss said

petition were granted by the district judge, and said petition was dismissed. Said judgment and decree dismissing said petition was final in the cause. Plaintiff contends that said judgment and decree was error, and that the court erred in dismissing the petition.

Now, therefore, comes the plaintiff, the Standard Nut Mar-
43 garine Company of Florida, and herewith prays an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, from the said judgment and decree rendered as aforesaid by the said district court, under the laws of the United States in such cases made and provided.

Petitioner submits and files herewith its assignment of errors upon the said judgment and decree.

Wherefore, the premises considered, your petitioner prays that an appeal in its behalf to the United States circuit court of appeals, aforesaid, situated at New Orleans, Louisiana, in said circuit, for the correction of the errors complained of, and herewith duly assigned, be allowed and granted; and that an order be had, fixing the amount of bond and security to be given by the defendant, as plaintiff in error, and conditioned as the law directs, and it prays a reversal of said judgment and decree.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,
A Corporation.

By GEORGE N. MURDOCK,
JAMES C. DAVIS,
Its Solicitors and Attorneys at Law.

In United States District Court

Order allowing appeal

Filed Oct. 8, 1930

It appearing to the court in the cause stated in the above and foregoing petition for appeal that the Standard Nut Margarine Company of Florida, a corporation, has filed with said petition for appeal its assignment of errors,

44 It is hereby ordered by the court that the appeal prayed for, be, and the same is hereby allowed and granted to the United States Circuit Court of Appeals of the Fifth Circuit, at New Orleans, Louisiana, from the judgment and decree rendered in said cause, and that said plaintiff give a bond, with good and sufficient security, in the sum of $250.00 that it, as appellant, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good.

This October 8th, 1930.

SAML. H. SIBLEY,
United States Judge.

In United States District Court

Assignment of errors

Filed Oct. 8, 1930

And now comes the plaintiff in the above-entitled cause by George N. Murdock and James C. Davis, its attorneys, and in connection with its petition for appeal says that in the record, proceedings, and in the final judgment aforesaid, manifest error has intervened to the prejudice of the said plaintiff, and assigns as error upon which it will rely for its prosecution of the appeal in the above-entitled cause from said judgment made and entered by the honorable court of the 19th day of September, 1930, the following grounds, to wit:

1. The court erred in granting defendant's motion to dismiss on September 19th, 1930, upon each and every ground set forth in said motion, for the reason that the same is contrary to law, and plaintiff avers that said district court has the power and authority to grant the relief prayed for in said bill of complaint, and further
45 avers that said district court has jurisdiction to grant the same, and plaintiff avers that said district court erred in failing to so hold, and erred in failing to deny said motion to dismiss.

By reason whereof plaintiff prays that the judgment aforesaid may be reversed, etc.

GEORGE N. MURDOCK,
JAMES C. DAVIS,
Attorneys for Plaintiff.

(Bond on appeal approved and filed Oct. 9, 1930. Omitted in printing.)

47 In United States District Court

Praecipe for transcript of record

Filed Oct. 8, 1930

To the CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA:

Please prepare forthwith a certified transcript of the record of the above-entitled cause for the appeal filed therein by the plaintiff, the Standard Nut Margarine Company of Florida, from the judgment rendered therein and dated September 19th, 1929, to the United States Circuit Court of Appeals for the Fifth Circuit, which record consists of the following:

1. Petition, May 2, 1930.
2. Defendant's motion to strike and answer, May 20, 1930.
3. Order continuing case until May 24, 1930, May 9, 1930.
4. Opinion denying preliminary injunction, June 2, 1930.
5. Defendant's motion to dismiss, August 11, 1930, and order dismissing bill, September 19, 1930.

6. Petition for appeal, October 8, 1930.
7. Order allowing appeal, October 8, 1930.
8. Assignment of errors, October 8, 1930.
9. Citation, October 8, 1930.

48 10. Bond, October 8, 1930.
11. Praecipe, October 8, 1930.

GEORGE N. MURDOCK,
JAMES C. DAVIS,
Attorneys for Plaintiff.

It is hereby stipulated and agreed by and by the counsel for the parties to the above entitled cause that the above and foregoing praecipe calls for the preparation of the transcript of record in said case containing all matters necessary or proper for the consideration of said cause on appeal to the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

Due and legal service of said praecipe is hereby acknowledged by the appellee in said cause this 8th day of October, 2930.

C. P. GOREE,
Attorney for Appellee,
Assistant U. S. Attorney.
GEORGE N. MURDOCK,
JAMES C. DAVIS,
Attorneys for Appellant.

49 (Clerk's certificate to foregoing transcript omitted in printing.)

Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the U. S. circuit court of appeals.

* * * * * * *

50 (Minute entry of argument and submission, February 23, 1931, omitted in printing.)

51 In United States Circuit Court of Appeals for the Fifth Circuit

No. 6065

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, APPELLANT

versus

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Georgia

James C. Davis and George N. Murdock, for appellant.

C. P. Goree, assistant United States attorney, and Harrison F. McConnell, special attorney, Bureau of Internal Revenue (Clint W.

Hager, United States attorney, C. P. Goree, assistant United States attorney, Harrison F. McConnell, special attorney, Bureau of Internal Revenue, and C. M. Charest, general counsel, Bureau of Internal Revenue, on the brief), for appellee.

Before Foster, Hutcheson, and Walker, circuit judges.

Opinion of the Court, filed April 22, 1931

WALKER, *Circuit Judge:*

This is an appeal from a decree sustaining a motion to dismiss a bill in equity filed by the appellant against the appellee, the
52 collector of internal revenue for the district of Georgia. The appellant is the same corporation which was the plaintiff in the case of Miller, Collector of Internal Revenue, v. Standard Nut Margarine Co., MS. U. S. Circuit Court of Appeals, Fifth Circuit. The two cases are substantially alike, except that in the instant case the appellant, which is not a manufacturer or dealer in Georgia, seeks protection of its interest in an established business by restraining the enforcement against jobbers and retail dealers in Georgia in appellant's product, Southern Nut Product, of penalties imposed, or threatened to be imposed, on such jobbers or retailers for alleged violations of the oleomargarine act (26 U. S. C. A. §§ 543, 544) by selling appellant's product without complying with requirements of that act, while in the cited case appellant sought injunctive relief against the threatened enforcement of a tax attempted to be assessed against itself under that act.

It appears from the opinion rendered by the district judge that he concluded that appellant, though not directly proceeded against in Georgia, may complain of threatened proceedings against jobbers and retail dealers in that State who handle appellant's product, and that appellant had no adequate legal remedy for the redress of the alleged wrongs complained of; but that he concluded that,
53 though the allegations of appellant's bill showed a state of facts substantially like that disclosed by the allegations and proofs in the cited case, with the exception above mentioned, the statute providing that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" (26 U. S. C. A. §154) has the effect of forbidding the maintenance of this suit. The last-mentioned conclusion is at variance with a conclusion reached by this court in the above-cited case. For reasons stated in the opinion rendered in that case, we conclude that the above-mentioned ruling in the instant case was erroneous. Because of that error the decree appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

54 In United States Circuit Court of Appeals

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

versus

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA

No. 6065

Judgment

April 22, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said district court for further proceedings not inconsistent with the opinion of this court.

55 In United States Circuit Court of Appeals for the Fifth Circuit

(Title omitted.)

Order staying mandate

Filed May 12, 1931

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 12th day of May, 1931.

(Signed) RUFUS E. FOSTER,
United States Circuit Judge.

56 (Clerk's certificate to foregoing transcript omitted in printing.)

57 Supreme Court of the United States

Order allowing certiorari

Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsed on cover:) File No. 36066. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 252. Josiah T. Rose, Collector of Internal Revenue for the District of Georgia, petitioner, vs. The Standard Nut Margarine Company of Florida. Petition for a writ of certiorari and exhibit thereto. Filed July 22, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931